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In the Supreme Court of the United States

OCTOBER TERM, 1940

Nos. _____

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LINK-BELT COMPANY

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INDEPENDENT UNION OF CRAFTSMEN

**PETITION FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT**

The Solicitor General, on behalf of the National Labor Relations Board, prays that writs of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit entered on April 13, 1940 (R. 1581-1582), insofar as that decree set aside and refused enforcement of an order issued by the Board against the Link-Belt Company.¹

¹The decree (R. 1581-1582) was entered jointly in two distinct proceedings instituted under Section 10 (f) of the National Labor Relations Act for review of the Board's order. One of the proceedings was initiated by petition of the Link-Belt Company (R. 1-39), the other by petition of

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 1565-1574), and the opinion of Judge Treanor, dissenting in part (R. 1574-1580), are reported in 110 F. (2d) 506. The findings of fact, conclusions of law, and order of the Board (R. 1519-1556) are reported in 12 N. L. R. B. 854.

JURISDICTION

The decree of the Circuit Court of Appeals was entered April 13, 1940 (R. 1581-1582). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

The basic question presented is whether there is substantial evidence to support findings of the Board that the Link-Belt Company dominated, interfered with, and supported a labor organization of its employees, and that the company discriminated against certain of its employees in regard to hire and tenure of employment because of their union membership and activities.

Subsidiary questions encompassed in this inquiry are whether the Board might treat as evidence of

the Independent Union of Craftsmen (R. 45-54), a labor organization found by the Board to be company-dominated. In its answers to both petitions, the Board requested enforcement of its order against the company (R. 39-44, 54a-54d).

company domination and support of a labor organization (1) the fact that the organization in question replaced an admittedly company-dominated predecessor without a substantial break in time or identity, and (2) solicitation of members for the successor labor organization on company property during working hours by certain supervisory employees of the company, and by other employees with the acquiescence of their supervisors.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. V, Sec. 151 *et seq.*) are set forth in the Appendix, *infra*, pp. 32-33.

STATEMENT

After the usual procedural steps, i. e., charge (R. 91-92), complaint (R. 55-60), answer (R. 96-98), hearing before a trial examiner, intermediate report of the examiner (R. 1469-1488), exceptions thereto (R. 1489-1517), and oral argument before the Board (R. 1519), as to none of which is any question raised, the Board issued its findings of fact, conclusions of law, and order (R. 1519-1556). In outline, and omitting jurisdictional facts, the Board found:*

*The evidentiary findings and the evidence supporting them are discussed under Point I of the Reasons for Granting the Writ, *infra*, pp. 11-23.

4

For some time before the enactment of the National Labor Relations Act, and for more than two years thereafter, Link-Belt Company (hereafter called the company) maintained and dominated, as it now concedes, an employees' representation plan (hereafter called the Plan) (R. 1524-1525). Between September 1936 and April 1937, however, a large number of the company's employees joined the Amalgamated Association of Iron, Steel, and Tin Workers of North America, Lodge 1604 (hereafter called the Amalgamated) (R. 1525). Upon learning on April 12, 1937, that this Court had sustained the constitutionality of the National Labor Relations Act,^a four employees, two of whom were employee representatives under the Plan, initiated the Independent Union of Craftsmen (hereafter called the Independent), primarily because of their hostility toward the Amalgamated (R. 1526-1527). Membership petitions, hectographed on a company machine, were circulated during working hours by Plan representatives and other employees; a number of the company's foremen themselves took an active part in soliciting signatures, and over 70 employees were signed up during a period of three days (R. 1527, 1529-1533). On April 19, after the Independent's membership drive had been successfully concluded, the employee representatives under the Plan and the management representative

^a *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, and companion cases.

dissolved the Plan (R. 1528). On the same day, the Independent requested recognition as the employees' exclusive bargaining representative, and two days later such recognition was granted by the company (R. 1527-1528). The Board concluded that the company had dominated and interfered with the formation and administration of the Independent and had contributed support to it (R. 1534-1535).

For 20 years the company engaged in industrial espionage through a labor spy supplied by the National Metal Trades Association, until, in March 1937, exposure of the spy by the United States Senate subcommittee on civil liberties ended his usefulness (R. 1535-1537).

In September 1936, the company discharged an employee, Salmons, because of his membership and activity in the Amalgamated, and another employee, Novak, because it mistakenly believed that he was active in the Amalgamated (R. 1525-1526, 1537-1540, 1550). In April 1937, the company required Peter Solinko, an employee, to join the Independent as a condition of employing his son, Frank Solinko (R. 1532-1533, 1550); and during the following month two employees, Karbel and Cumorich, were discharged because they refused to join the Independent and joined the Amalgamated (R. 1542-1544). Finally, the company discharged Kalamarie, in November 1937, because of his activity in the Amalgamated (R. 1547-1549).

Upon these findings, the Board ordered the company to cease and desist from the unfair labor practices found, to withdraw recognition from and disestablish the Independent, to make Novak whole for loss of pay suffered by him by reason of his discriminatory discharge, to offer Karbel, Cumorich, and Kalamarie reinstatement, with back pay, and to post appropriate notices (R. 1553-1556).⁴

Thereafter the company and the Independent filed separate petitions in the court below to review and set aside the Board's order (R. 1-39, 45-54). The Board answered, requesting full enforcement of its order against the company (R. 39-44, 54a-54d).

The court sustained the Board's findings and order as to labor espionage and as to Novak; but set aside, as unsupported by substantial evidence, the findings as to the Independent, and as to Salmons, Karbel, Cumorich, Kalamarie, and the Solinkos (R. 1565-1574). Accordingly the court entered a decree (R. 1581-1582) on April 13, 1940, which failed to enforce paragraphs 1 (a) and 2 (a) of the Board's order (R. 1554), requiring the company to cease and desist from dominating or interfering with the Independent and to withdraw recognition from that organization as a collective

⁴ No affirmative relief was ordered as to the Solinkos or as to Salmons. Salmons had theretofore been reinstated by the company under an agreement that he would not receive back pay (R. 1540, 1551-1552). Novak had also been reinstated (*ibid.*).

bargaining representative of the employees, and which likewise failed to enforce paragraph 2 (c) and (d) (R. 1555), directing the company to reinstate Karbel, Cumorich, and Kalamarie, with back pay. Judge Treanor dissented, except as to Kalamarie, from the refusal to enforce the reinstatement provisions of the order, and from the refusal to enforce the cease and desist order as to the Independent, although he did not think the interference and domination sufficient in degree or sufficiently long-continued to warrant disestablishment, the usual affirmative relief (R. 1574-1580).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the following findings of the Board are not supported by substantial evidence:

(a) That the company dominated and interfered with the formation and administration of the Independent and contributed support to that organization.

(b) That the company discharged Salmons, Karbel, Cumorich, and Kalamarie because of their union membership and activity, and conditioned the employment of Frank Solinko upon Peter Solinko's joining the Independent.

2. In holding, in effect, that replacement of the company-dominated Plan by an inside successor, the Independent, without a substantial break in time or identity, was not evidence of company

interference with, and domination and support of, the Independent.

3. In holding that the company was not responsible for the activities of certain of its supervisory employees in soliciting members for the Independent on company property during working hours.

4. In refusing to enforce, and in setting aside paragraphs 1 (a), 2 (a), 2 (c), and 2 (d), and in modifying paragraph 2 (f) of the Board's order.

REASONS FOR GRANTING THE WRIT

I

While the testimony upon which the Board's findings of fact are based is in large part controverted, we submit that they are supported by evidence which is plainly "substantial" within any proper meaning of that term. Upon this state of the record, it was incumbent upon the court below to accord conclusive weight to the Board's findings and to enforce the provisions of the order based thereon if those provisions were otherwise proper under the Act. Section 10 (e) and (f) of the Act; *National Labor Relations Board v. Waterman S. S. Co.*, 309 U. S. 206; *National Labor Relations Board v. Bradford Dyeing Ass'n*, No. 588, last Term, decided May 20, 1940. Manifestly, it is in a case involving sharply conflicting evidence, rather than in one where the proof is uncontroverted and permits of but one conclusion, that the principle of these decisions is of critical significance in the adminis-

tration of the Act. Yet the court below apparently considered the presence of conflicting evidence as warrant for substituting its views upon the credibility of witnesses and the weight of the evidence for those of the Board.

The court's opinion gives an impression of adherence to the established principles of judicial review under the Act. This impression, however, results only because the court, in its discussion of the evidence, repeatedly omits mention of the pertinent findings of the Board and of the evidence supporting them; instead the court picks out and emphasizes evidence contrary to that which persuaded the Board and recites, as though they were either undisputed facts or unchallenged findings of the Board, what are in truth the court's own findings made upon conflicting evidence.

In sum, we submit, the Seventh Circuit in this case has permitted itself a latitude of review greatly in excess of that sanctioned by the Act and the decisions of this Court.⁵ Moreover, the court in effect

⁵ The Government believes that this tendency has been manifested recurrently by the Seventh Circuit in Labor Board cases. While considerations of space prevent separate discussion of each case here, we think that examination of the cases discloses that the Seventh Circuit has in two major ways frequently impinged upon the jurisdiction conferred upon the Board by the Act: First, it has (in this case among others), assumed for itself fact-finding powers rather than limited itself to inquiry whether the findings of the Board are supported by substantial evidence. Second, it has tended (as this Court held it did in *National Labor Relations Board v. Falk Corp.*, 308 U. S. 453) to substitute its

overruled the Board's conclusion that replacement of the company-dominated Plan by an inside suc-

own judgment for that of the Board as to the appropriate remedy. This conclusion is supported, we think, at least *prima facie*, by the fact that the court below has not granted full enforcement of a Board order in any of the fifteen cases which have thus far come before it. In five cases the orders were entirely set aside. *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 96 F. (2d) 948, affirmed on other grounds, 306 U. S. 292; *Fansteel Metallurgical Corp. v. National Labor Relations Board*, 98 F. (2d) 375, modified and affirmed as modified, 306 U. S. 240; *Jefferson Electric Co. v. National Labor Relations Board*, 102 F. (2d) 949; *C. G. Conn v. National Labor Relations Board*, 108 F. (2d) 390; *Inland Steel Co. v. National Labor Relations Board*, 109 F. (2d) 9. In the remaining ten cases the court modified the Board's order. *National Labor Relations Board v. Falk Corp.*, 102 F. (2d) 383, 106 F. (2d) 454, Board order enforced, 308 U. S. 453; *National Labor Relations Board v. Boss Mfg. Co.*, 107 F. (2d) 574; *Montgomery Ward & Co. v. National Labor Relations Board*, 107 F. (2d) 555; *National Labor Relations Board v. Goshen Rubber & Mfg. Co.*, 110 F. (2d) 432; *National Labor Relations Board v. Swift & Co.*, 108 F. (2d) 988; *Link-Belt Co. v. National Labor Relations Board*, 110 F. (2d) 506; *National Labor Relations Board v. J. Greenebaum Tanning Co.*, 110 F. (2d) 984; *Fort Wayne Corrugated Paper Co. v. National Labor Relations Board*, decided March 28, 1940; *M. H. Ritzwoller Co. v. National Labor Relations Board*, decided May 8, 1940; *Stewart Die Casting Corp. v. National Labor Relations Board*, decided July 3, 1940. In marked contrast, in all cases decided by this Court and by the federal circuit courts of appeals other than the court below (excluding consent-decree cases and action taken by the circuit courts in cases where certiorari was granted by this court), orders of the Board have, as of June 25, 1940, been enforced in full in 59 cases, enforced as modified, frequently in minor respects, in 36 cases, and set aside entirely in 18 cases.

cessor, the Independent, without a substantial break in time or identity, was evidence of company interference with, and domination and support of, the Independent. And the court specifically held that the company was not responsible for the activities of certain of its supervisory employees in soliciting members for the Independent, because they did not have authority to hire and discharge. In both of these last two particulars the decision below is contrary to a number of decisions in other circuits (*infra*, pp. 25-30).

The following review of the Board's findings, of the supporting evidence, and of the court's discussion of the evidence, concerning company domination and support of the Independent, will, we believe, demonstrate that the representations made above are well-grounded.*

1. The Board based its ultimate findings that the company dominated and interfered with the formation and administration of the Independent and afforded support to that organization upon the

* In connection with the discussion of the company's relations with the Independent, we shall also consider the findings and evidence that Salmons was discriminatorily discharged, and that Frank Solinko was hired upon condition that his father join the Independent. For the sake of brevity, we do not discuss the evidence supporting the Board's findings that Karbel, Cumorich, and Kalamarie were discriminatorily discharged. But we have assigned as error the court's holding that those findings are not supported by substantial evidence and, if the writ is granted, we will argue that those findings and the corresponding provisions of the Board's order are valid.

following underlying findings, supported in each instance by the evidence cited:

(a) From 1933 until April 19, 1937, the company maintained a plainly company-dominated employees' representation plan, which, the company conceded at the hearing, was illegal under the Act, but which it nevertheless continued for almost two years after the effective date of the Act (R. 1524-1525; 1296-1301, 146-152, 204-205, 280-281, 1127, 1194-1198).

(b) On the day following the Amalgamated's first organizing meeting for the company's employees, held on September 20, 1936, Plant Manager Berry discharged Salmons, the leading employee organizer for the Amalgamated, saying that he was spreading "union propaganda"; on the same day Novak, whom the company mistakenly believed to have joined and organized for the Amalgamated, was also discharged by Berry, who accused Novak of being an organizer and instigator of a union; both Salmons and Novak were given half an hour to leave the company's property (R. 1525-1526, 1534, 1537-1540; 153, 169, 217-218, 699, 1122, 1124, 1132).

(c) On April 12, 1937, the day this Court upheld the constitutionality of the Act, the formation of

In the following discussion the references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence.

The findings and evidence are tabulated in order to facilitate comparison with the court's treatment of each finding or group of findings, discussed *infra*, pp. 16-23.

the Independent was commenced by four employees, two of them Plan representatives, who were "dismayed" at the decisions because "we had banked our hopes that it [the Act] would be declared illegal" (R. 1526-1527; 715-716, 758-760, 1413). The Plan representatives, without exception, were active in promoting the Independent (R. 1526-1527, 1534, note 8, this page.)

(d) On April 13, at the request of a Plan representative, petitions for membership in the Independent were hectographed on a company machine (R. 1527; 717, 1040-1044, 1413, 1429-1430). During each of the following three days Plan representatives and others* circulated the petitions

* Every one of the employee representatives under the Plan, i. e., Froling, Brucks, Lackhouse, Greenlee, Bailey, and Litster (R. 1413), admittedly participated in the solicitation (R. 165, 168, 285-286, 291, 344-346, 570, 578-579, 796, 800, 803, 815-819, 829, 875, 880-881, 914-915, 1060). Froling, who was chairman of the Plan's board of employee representatives, testified that he solicited the entire machine shop, "from 110 to 120" men, during working hours (R. 818-819). Lackhouse testified that he carried a list through the plant and obtained some 40 signatures (R. 285-286, 291-292). Kovatch, an employee, testified that his foreman allowed him to take time off during working hours and that he then solicited "practically every man in the foundry, about 300" men, proceeding systematically from man to man (R. 864, 868). Another employee, Petrowski, carried a list "through all the departments * * * all day long and * * * stayed overtime that night to sign up some of the night men" (R. 286), while Timekeeper Erickson "just went along the line there, every man he came to" (R. 349).

throughout the plant during working hours, engaging in open and extensive solicitation of members for the Independent; from the character and extent of the solicitation, the Board drew the inference that the members of the supervisory staff generally were aware of the campaign (R. 1527, 1529, 1533-1535; 222-224, 286-287, 301, 306-307, 349, 362, 367, 425, 469, 529, 533, 539, 705-707, 750, 831, 834, 851, 855-856, 857-858, 863-865, 902, 906, 921, 924-925, 1058).

(e) Some of the company's supervisory employees participated in the solicitation of members for the Independent. Siskauskis, a foreman, urged his men to sign the Independent petitions and himself signed for illiterate employees (R. 1529-1531; 285-286, 289-290, 297-298, 314, 329, 338, 540-542, 544-549, 659, 674).^{*} Lackhouse, an employee, was given permission by his foreman, Nyberg, to stop work and join in the organizing for the Independent; half an hour later Assistant Superintendent Olson called Lackhouse from his work and expounded to him the advantages of an "inside" union; Lackhouse thereupon stopped work and solicited signatures (R. 1529; 284-285, 291-293, 303, 425, 527-528, 1048). Foreman McKinney instructed Belov, a night boss, to solicit the employees on the night shift, which Belov did (R. 1531-1532; 622-623, 631, 410-411, 417, 561, 568, 630-631, 1225).

^{*} There was evidence that Siskauskis threatened a number of employees with discharge unless they signed (R. 659, 541).

Employment Manager Staskey hired Frank Solinko only after instructing his father, Peter Solinko, to join the Independent; the Board found that Frank Solinko's employment was conditioned upon his father's membership in the Independent (R. 1532-1533; 242-253, 265-266, 269-270).

(f) The Plan remained in existence until the Independent's membership drive was successfully completed. On April 19, the same day that the Independent presented its membership petitions to the company and asked exclusive recognition, the Plan's employee representatives, all of whom were leading organizers of the Independent, entered into an agreement with Plant Manager Berry dissolving the Plan (R. 1527, 1528; 724, 822-823, 824, 1141-1142, 1143-1144, 1195-1196, 1413). The exclusive recognition requested by the Independent was granted on April 21, prior to the organization's first membership meeting, held the following day (R. 1528; 427, 722, 730, 763, 780, 1148, 1180, 1420). Litster, one of the employee representatives under the Plan, acted as chairman of this meeting and at least two supervisory employees attended (R. 1528; 435-436, 641, 648-649, 732, 734, 790, 1051, 1057). The Board concluded that "The employees of respondent of necessity must have linked the successor organization to the admittedly illegal Plan and thus to the respondent because of the identity of leading figures in the Plan and the Independent * * *" (R. 1534).

2. The court disposed of each of the foregoing findings or groups of findings as follows:

(a) Although the illegality of the Plan was conceded (*supra*, p. 12) and although the court noted in its opinion that the company had defrayed all expenses of that organization (R. 1567), there is no recognition in the opinion that the company's maintenance of the Plan from July 5, 1935, until April 19, 1937, violated the Act.

(b) The court rejected the Board's finding that Salmons, the leading Amalgamated organizer who was discharged on the day following the Amalgamated's first organizing meeting, was ousted because of his union activities. Instead, the court found that Salmons was discharged because he solicited members for the Amalgamated during working hours (R. 1570-1571). The court ignored the Board's subsidiary findings, based upon specific testimony, that Berry discharged Salmons expressly upon the ground that he was spreading "union propaganda" and gave him a half-hour to leave the plant (R. 153, 169, see also R. 217-218, 699); that there was no plant rule against solicitation (R. 1539-1540; 171, 196, 208, 815, 822, and see *supra*, pp. 13-15); that Salmons' activities did not interfere with his work (R. 1540; 171, 208, 1233, and see *infra*, p. 19); and that organizers for the Independent thereafter engaged in open and widespread solicitation on company time without penalty or restraint (R. 1540; *supra*, pp. 13-15). The court

stated only that the Board should have accepted the testimony of Plant Manager Berry and Superintendent Conroy (R. 1112, 1124, 1132) that Salmons had been discharged for soliciting on company time (R. 1570-1571).¹⁰ In brief, the court did not refer to the Board's subsidiary findings and the evidence supporting them, but pointed instead to other testimony which it preferred to credit and upon which it made its own finding.

The court accepted the Board's finding that Novak was discharged because the company erroneously supposed that he had engaged in union activity (R. 1572). However, the court apparently did not regard either this discharge, or the findings concerning 20 years of industrial espionage, which it also accepted (R. 1572), as evidencing hostility on the part of the management toward the Amalgamated; instead, it referred (R. 1570), to testimony (R. 282) by an organizer for the Amalgamated that he had never heard Plant Manager Berry say anything hostile to that union, evidence surely of insignificant probative force.

(c) The extensive participation by all of the employee representatives under the Plan in initiating

¹⁰ The court also referred to the testimony of Foreman Forss (called Fross in the opinion) as supporting its finding (R. 1570-1571). However, Forss did not testify concerning the reason for the discharge of Salmons (R. 1005-1011, see also R. 153-154, 168, 1234). Forss testified that he had never seen Salmons engaged in solicitation and did not know whether or not Salmons had solicited, except that Salmons had told him, after the discharge, that he had solicited (R. 1006-1007).

the Independent and obtaining its acceptance by the employees, a factor accorded weight by the Board and repeatedly emphasized in similar cases by other circuit courts of appeals (*infra*, pp. 25-27) in approving findings of company interference, domination and support, was entirely disregarded by the court. This omission, coupled with the court's remark that one of the organizers "had never approved of the Employees Representative Plan" (R. 1568), wholly distorts the record. Similarly, the court emphasized that none of the officers of the Independent, elected subsequent to the grant to it by the company of exclusive recognition, was a former representative under the Plan (R. 1569); it did not mention the undisputed fact that a majority of the members of the Independent's governing board, who control the Independent's policies and are of higher rank than the officers, had been Plan representatives (R. 794-795, 807, 1413).

(d) The Independent's membership petitions, hectographed on a company machine at the behest of a Plan representative, were not mentioned by the court. The opinion disposed of the wholesale solicitation on company time and property by stating that "some of the signatures were obtained during working hours, but the majority were obtained outside of working hours" (R. 1568). This finding by the court, even were it supported by the evidence, is plainly beside the point: it was not essential that the solicitation result in the obtain-

ing of a major portion of the signatures on company time in order for its occurrence to support findings that Section 8 (2) was violated. The court also minimized the extensive and systematic solicitation on behalf of the Independent by finding that both the Amalgamated and the Independent organizers "engaged to some extent in union activities on company time" (R. 1569). While there was some solicitation on behalf of the Amalgamated during working hours (R. 862, 894-895, 900, 913, 916, 918, 921, 1060), the record leaves no doubt that it was neither of the magnitude nor of the open, organized, and mass character of that carried on for the Independent. Four witnesses called by the Independent testified they had not seen a single instance of solicitation on behalf of the Amalgamated (R. 851, 889, 873, 829), and the Board found, upon substantial evidence, that the immediate superior of Salmons, the most active Amalgamated organizer, was unaware that he engaged in solicitation (R. 1540; 1006, 154, 168, 1234). There is no indication that, as in the case of the Independent, the supervisors were aware of or tolerated solicitation for the Amalgamated.

(e) The court in part ignored and in part rejected the Board's findings concerning participation by supervisors in the Independent's membership drive. The court did not mention the most flagrant instance of supervisor solicitation, that by Foreman Siskauskis. It referred to Assistant Superintendent Olson's recruiting of a solicitor for

the Independent as a simple act of explaining "to an employee the advantages of an inside union over an outside union" (R. 1571). It disposed of the participation by Foremen Nyberg and McKinney on the ground that they did not have power to hire and fire (*ibid.*), although that test of employer responsibility is contrary to decisions of other circuit courts of appeals (*infra*, pp. 28-30), and although the men named had power to recommend hiring and discharge (R. 931, 962-963, 983, 1064, 1096). Finally, the court rejected the Board's finding that Employment Manager Staskey hired Frank Solinko on condition that his father join the Independent (R. 1571-1572).¹¹

¹¹ The court, pointing to an asserted chronological flaw in the testimony (R. 242-253, 264-266, 269-270) of Frank and Peter Solinko, held (R. 1571) that the evidence "does not reasonably support" the Board's findings as to the Solinkos. The supposed flaw, we submit, plainly does not exist (see R. 264-265), and no other valid ground is set forth in the opinion which would warrant the court's substitution of its own views concerning the credibility of witnesses for those of the Board. The court added that even if the conversation between Peter Solinko and Staskey took place on the day Frank Solinko was hired, "then it was after the Independent had been recognized by the company as the bargaining agent of the employees. No inference unfavorable to the company can be reasonably drawn from these facts" (R. 1571-1572). But conditioning Frank's hiring upon Peter's joining the Independent was not any the less a violation of Section 8 (3) or "support" for the Independent within the meaning of Section 8 (2) whether it occurred after or before the recognition of the Independent. Such discrimination is permissible only pursuant to a valid closed-shop agreement, absent here. Section 8 (3) of the Act.

(f) The court did not mention the continued existence of the Plan during the period when the employees were being herded into the Independent; the fact that the leaders of the Plan, an organization firmly identified with the management, took a principal part in forming and establishing the inside successor organization; or the fact that the Plan's termination was timed to the day with the Independent's demand for recognition. Other circuit courts of appeals have regarded the replacement of a company-dominated labor organization by an "inside" successor, without a substantial break in time or identity, as cogent evidence of employer interference and participation (*infra*, pp. 25-27). Thus the employees in the present case were not afforded an interval during which they were able, with knowledge that the company had abandoned its efforts to control, through the Plan, its employees' means of representation, and that the Plan was no more; to exercise a free choice between forming another "inside" organization or joining an affiliated union. The slate was never wiped clean. *National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 250. Yet the court here attributed no weight to what occurred before the grant of exclusive recognition to the newly established organization; it merely noted, obscuring the fact that the two events were almost simultaneous, that "the undisputed evidence discloses that the Employees Board was completely dissolved and abandoned

prior to the recognition of the Independent" (R. 1570).¹²

Lastly, the court found, contrary to the Board (R. 1533-1534), that during 1936 Plant Manager Berry instructed the supervisory staff "to refrain from engaging in union activities" (R. 1569). Berry's initial testimony was that he discussed "labor" with his supervisory staff in 1936, and that after April 12, 1937, he gave definite instructions

¹² In connection with the company's recognition of the Independent, the court said that "It is well to note here that up to this time the Amalgamated had not made a demand for recognition" (R. 1568). This circumstance, of course, was entirely irrelevant if the Independent was a company-dominated labor organization; an order to cease violating Section 8 (2) and to disestablish the illegally supported labor organization is justified whether or not there is a majority representative. *National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241; *National Labor Relations Board v. Falk Corp.*, 308 U. S. 453. The court's emphasis upon the absence of a demand by the Amalgamated for recognition demonstrates the same fundamental misconception of Section 8 (2) evinced by the same court in the *Falk* case.

The attendance of supervisors at the Independent's first general meeting was likewise discounted in the court's opinion. Foreman Grenis' attendance is not mentioned at all and the court refers to Siskauskis as having attended "without participating" (R. 1571). There is evidence that Siskauskis voted concerning the adoption of the constitution prepared by the Independent's attorney (R. 435-436; see R. 1051, 1057, 1531); the Board made no finding upon this point. The court's further statement that the "mere attendance by a foreman" is not evidence tending to establish interference (R. 1571) is in conflict with the decisions of other circuit courts of appeals (note 16, p. 30, *infra*).

to the supervisory staff to remain neutral in union contests (R. 1153). On cross-examination Berry admitted, as the Board pointed out (R. 1533-1534), that he did not issue the instructions until after April 19, the date on which the Independent concluded its membership drive and made its request for recognition (R. 1181-1182). Hence the Board properly concluded that the instructions were not issued until after they were "useless since a majority of the employees had joined the Independent, in a large part because of the attitude displayed by and the activities of the respondent's supervisors" (R. 1534). After the *fait accompli*, Berry's instructions plainly amounted to no more than lip service to the employees' right of free self-organization."

After discussing the evidence in the fashion we have described, the court concluded that "Based upon the foregoing facts, the Board found that the

"The court did not explain why the instructions found by it were significant. The company would not be absolved from responsibility for the activities of its supervisors in connection with the Independent even if such activities were in violation of precedent instructions. The mere issuance of instructions is not sufficient; at the least, the employer must either communicate his neutrality to the employees generally (*H. J. Heins Co. v. National Labor Relations Board*, 110 F. (2d) 843, 846-847 (C. C. A. 6th), certiorari granted, No. 73, this Term) or take some other "effective means to stop repeated violations of the Act" (*Swift & Co. v. National Labor Relations Board*, 106 F. (2d) 87, 93 (C. C. A. 10th)). See also *Consumers Power Co. v. National Labor Relations Board*, decided June 27, 1940 (C. C. A. 6th).

employer had dominated or interfered with the administration of the Independent; and discouraged membership in the Amalgamated, thereby violating Section 8 (1) and (2) of the Act. In our opinion the evidence, taken most favorably to the Board, does not furnish substantial support for the Board's findings" (R. 1569-1570). As we have shown, however, the Board's findings concerning the unfair labor practices were not based upon the evidence referred to in the court's opinion; on the contrary, the facts upon which the Board did rely were, for the most part, either not mentioned at all or were but partially or inaccurately stated by the court. Insofar as the opinion purports to set forth a full and accurate description of the Board's findings and the supporting evidence, it gives a grievously misleading impression.

The court's failure to accord conclusiveness to findings of the Board which are supported by substantial evidence, its ignoring of important findings of the Board which had ample evidentiary support, and its practice of reappraising the evidence generally to reach its own conclusions as to weight and credibility and to make its own findings and draw its own inferences upon conflicting proof, plainly transcend the bounds of permissible review, as the dissenting judge pointed out (R. 1576-1577). As a result, extensive violations of the Act have gone unremedied in the present case. Moreover, in the view of the Government, the action of the

court below in this case indicates that effective enforcement of the Act in the Seventh Judicial Circuit, an important industrial area, is in substantial jeopardy.

II

The decision below is in conflict with decisions of other federal courts of appeals.

1. The holding of the court below that there was not "any evidence" (R. 1570) sustaining the Board's findings of company domination and support of the Independent, and the court's refusal to accept as support for such findings the uncontroverted facts that the Independent was formed and established while the employer-dominated Plan continued to exist and that the employee representatives under the Plan took a leading part in obtaining acceptance of the Independent by the employees, is in conflict with the decisions in *Westinghouse Electric & Manufacturing Co. v. National Labor Relations Board*, decided June 10, 1940 (C. C. A. 2d), and *Kansas City Power & Light Co. v. National Labor Relations Board*, 111 F. (2d) 340 (C. C. A. 8th). In the *Westinghouse* case the Second Circuit based its decision sustaining Board findings of employer interference with and support of an "inside" union solely upon the fact that the inside union succeeded an illegal employee representation plan "without any line of fracture, at least on the surface." The court pointed out that the Plan had not been openly dis-

avowed by the employer and that the employer had permitted his known favor for the Plan to be carried over to the successor organization. It said:

The theory is that in cases such as this, where an unaffiliated union seems to the employees at large to have evolved out of an earlier joint organization of employer and employees, the Board may take it as datum, in the absence of satisfactory evidence to the contrary, that the employees will suppose that the company approves the new, as it did the old, and that their choice is for that reason not as free as the statute demands, * * * the company did not make any effort to make it plain to the employees generally that the "Independent" was not a revision, or amendment, of the "Plan." On the surface it seemed to be such, for it emanated from the old elected representatives, and that alone established an appearance of continuity between the two. * * * So far as appears, [the company] was content to let them assume, what was true, that the "Independent" had arisen out of the "Plan"; and to believe, as they quite naturally might have done, that it preferred the successor to the C. I. O. local just forming, and still very feeble.

In closely similar circumstances, the Circuit Court of Appeals for the Eighth Circuit in the *Kansas City Power* case approved the Board's findings of domination, interference and support, pointing to the lack of an "hiatus between the Plan and the

Association" and to the fact that "the attitude of the company to the effect that the Plan had become inoperative was not brought to the attention of the employees prior to or during the campaign period of organization of the Association * * *"
(111 F. (2d), at 346, 347).

The decision below is likewise inconsistent with the many decisions in which other circuit courts of appeals and the Court of Appeals for the District of Columbia have held that evidence that a group of employees who were responsive to desires of the management by reason of their service as representatives under a company-dominated representation plan have taken a leading part in replacing the plan with a successor organization, furnishes weighty support for a finding that Section 8 (2) was violated with respect to the successor.¹⁴

¹⁴ *National Labor Relations Board v. American Manufacturing Co.*, 106 F. (2d) 61, 68 (C. C. A. 2d), modified and affirmed, No. 664, last Term, decided March 11, 1940; *Republic Steel Corp. v. National Labor Relations Board*, 107 F. (2d) 472, 476, 477 (C. C. A. 3d), certiorari granted limited to another point, No. 14, this Term; *Union Drawn Steel Co. v. National Labor Relations Board*, 109 F. (2d) 587, 590-591 (C. C. A. 3d); *Texas Co. v. National Labor Relations Board*, decided June 19, 1940 (C. C. A. 5th); *National Labor Relations Board v. J. Greenebaum Tanning Co.*, 110 F. (2d) 984, 985-986 (C. C. A. 7th); *Swift & Co. v. National Labor Relations Board*, 106 F. (2d) 87, 92, 93, 94, 95 (C. C. A. 10th); *Continental Oil Co. v. National Labor Relations Board*, decided June 13, 1940 (C. C. A. 10th); *International Association of Machinists, etc. v. National Labor Relations Board*, 110 F. (2d) 29, 43 (App. D. C.), certiorari granted, No. 16, 1940 Term; cf. *National Labor Relations Board v.*

2. The holding of the court below (R. 1571) that, because the foremen who participated in the Independent's membership campaign did not have power to hire and discharge employees, the company could not be held responsible for their activities, is in conflict with *National Labor Relations Board v. American Manufacturing Co.*, 106 F. (2d) 61, 64, 67 (C. C. A. 2d), No. 664, last Term, modified and affirmed March 11, 1940; *Virginia Ferry Corp. v. National Labor Relations Board*, 101 F. (2d) 103, 105-106 (C. C. A. 4th); and *International Associa-*

Brown Paper Mill Co., 108 F. (2d) 867, 871 (C. C. A. 5th), certiorari denied, No. 1008, last Term; cf. *System Federation No. 40, etc. v. Virginian Ry. Co.*, 11 F. Supp. 621, 627, affirmed, 84 F. (2d) 641 (C. C. A. 4th), affirmed, 300 U. S. 515.

The Report of the House Committee on Labor on the bill which became the Act refers to employee representatives under a company-dominated plan of employee representation as "an active group of propagandists among the employees for the type of employee representation the company would prefer to deal with." H. Rept. No. 1147, 74th Cong., 1st Sess., p. 18.

In the *International Association of Machinists* case, *supra*, the Court of Appeals for the District of Columbia said (110 F. (2d) 29, 43):

"Acme Welfare was a company union. It follows necessarily that its leading promoters were company representatives. Men accustomed to such submission seldom regain independence overnight. The interval, if there was one, required for the transfer of allegiance * * * from Acme Welfare and the company to I. A. M. was too brief for disruption of the old and basic loyalty. The evidence supports the conclusion that it was not disrupted, but continued, though manifested in less obvious but more effective form. All that they did, therefore, is imputable to the company."

tion of Machinists, etc. v. National Labor Relations Board, 110 F. (2d) 29, 44-45 (App. D. C.), certiorari granted, No. 16, this Term. In each of those cases, it was expressly held, over the defense that the supervisory employees involved lacked authority to hire and discharge, that the employer was answerable for their acts.¹⁵ The decision also conflicts in principle with decisions not specifically discussing the "hire and fire" test but holding the employer responsible for acts of interference in union affairs by foremen, and even functionaries of lower rank, possessing authority to direct employees in their work or other indicia of managerial authority. *National Labor Relations Board v. A. S. Abell Co.*, 97 F. (2d) 951, 956 (C. C. A. 4th); *H. J. Heinz Co. v. National Labor Relations Board*, 110 F. (2d) 843, 846 (C. C. A. 6th), certiorari granted, No. 73, this Term; *National Labor Relations Board v. Sunshine Mining Co.*, 110 F. (2d) 780, 792 (C. C. A. 9th); *Swift & Co. v. National Labor Relations Board*, 106 F. (2d) 87, 92-95, 95 (C. C. A. 10th). The general question of the responsibility of employers for the activities of minor supervisory employees is of frequent occurrence in the administration of the Act, and is now before this Court in the *H. J. Heinz* and *International Association*

¹⁵ In the *Machinists* case, *supra*, the court characterized the power to recommend hiring and dismissal, which the foremen in the principal case did possess (*supra*, p. 20), as being "as potent, practically, as the power to 'hire and fire'" (110 F. (2d), at 43).

of *Machinists* cases, *supra*. It is desirable that the writ be granted in the present case so that this Court may pass upon the additional facet of the question presented by the apparently inflexible application of the "hire and fire" test in the decision below.

Finally, on this aspect of the case, the decision below is plainly in conflict with the decision in *Titan Metal Manufacturing Co. v. National Labor Relations Board*, 106 F. (2d) 254 (C. C. A. 3d), certiorari denied, 308 U. S. 615, in which the court held that (p. 259):

both the threats and the promises are uttered by foremen or higher employees on company time and on company property. We are not concerned, therefore, with the disturbing question of how much responsibility creates a "supervisory" employee.¹⁶

CONCLUSION

The decision of the court below represents a wide departure from the established principles governing review of orders of the National Labor Relations Board, and thus raises an important public

¹⁶ The decision of the court below that "the mere attendance by a foreman at the meeting [of the Independent] is not evidence of interference" (R. 1571), is inconsistent with the decision of the Circuit Court of Appeals for the Fourth Circuit in *National Labor Relations Board v. Wallace Manufacturing Co.*, 95 F. (2d) 818, 820, and with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Oudahy Packing Co. v. National Labor Relations Board*, 102 F. (2d) 745, 748, 751, certiorari denied, 308 U. S. 565.

question concerning the proper and effective enforcement of the Act in the Seventh Judicial Circuit. In addition, the court's rulings conflict on several important questions with numerous decisions of other circuit courts of appeals. For these reasons, we respectfully submit that this petition for writs of certiorari should be granted.

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National Labor Relations Board.

JULY 1940.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Supp. V., Sec. 151 *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

SEC. 10 (e). The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any dis-

district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *